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ABSTRACT

An instrumental music teacher in Anne Arundel County (Maryland) has been presented with a situation where a parent of a special education child wishes to enroll the child in the noncurricular school music program. This raises the question of his liability if he limits or refuses special education students in the program based on their disabilities. This paper details the teacher's examination of relevant case law which might shed light on a solution, after first noting that there is little or no case law dealing specifically with music education. A goal of this paper is to establish a consensus by which it can be said that the law of these other types of cases could or could not be applicable to music instruction. To do this, it must first be established that instrumental music is not a right but conversely is a privilege that the public school system provides as an addition to the basic education of the students of the state. (BT)

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A Study of the Liabilities Concerning Exclusion from Non-Curricular Studies (Instrumental Music) in the Public Schools.

by
S. Joseph Corral

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INTRODUCTION

I have been presented with situations where special education students have wanted to take lessons on various musical instruments. Several of these children are not mentally and/or physically able to be successful in this endeavor. This raised the question of my liability if I limited or refused their participation in the program based on their disabilities.

In the county where I am employed the idea has never been raised as to the ability of a teacher to exclude the student from participation in a non-curricular activity due to his disabilities. In the area of Instrumental Music, it has been the practice, to the best of my knowledge, to be all inclusive for all students. No student is turned away. However, now I have been presented with a situation where a parent of a special education child wishes to enroll her child in the program. Unfortunately, it is the judgement of his teacher, his Occupational Therapist, Physical Therapist, nurse, teacher's aid, the guidance counselor, and the administration of the school that this student would not be successful in this endeavor. Nonetheless, the mother is insisting that he be allowed to participate. To prevent a lawsuit, the administration has convinced me to "play along" to appease the mother. Hopefully, the child will become frustrated and choose not to continue after an initial period of failure. This raises the question about whether I can exclude a student based on his lack of ability.

Many years ago, when I was in elementary school, I can remember being tested for the instrumental music program. It was necessary for the student to be able to display certain musical skills such as pitch discrimination, rhythm recognition, and musical imitation. It was necessary to show certain minimal motor skills necessary to perform the tasks needed to play the instrument. To carry it even further, the instrumental music teacher also made the decision about which instrument each student would play. This was accomplished by the teacher using various methods including a physical overview of the child. Is the student big or small? What physical qualities does he possess? Does he/she have the proper physical development to play a particular instrument? This would decide which instrument the teacher would "suggest" to the parents. It was all very informal with the teacher mainly using experience and common sense. Unfortunately, today, with the fear of litigation and the possibility of a perception of discrimination, this practice has been eliminated and replaced with the all inclusive practice stated above.

Consequently, when the initial presentation of choices is made to the student, the teacher can have no input. He merely presents the instruments available, and waits for the student to make a decision. This leads to very irregular balance in the band, with an abundance of one instrument or a lack of another. The teacher cannot or is not allowed to develop a "band" with any kind of musicality. To avoid litigation and accusations of discrimination, the school system and the music department in particular have adopted a policy of allowing anyone to participate without concern for musical talent, motor skill development or the necessary physical development. When presented with a student that clearly cannot be successful in the program for any number of reasons, the teacher is not allowed to exclude him from participation. The large questions regarding this are: Are non or extracurricular activities a "right" or a "privilege?" Secondly, What factors could shift the desire to participate to a right? Thirdly, assuming a lack of case law specifically on

the topic, can other case law be used to draw a parallel to exclusion from participation?

BACKGROUND

In researching the case law for this topic, it became apparent that there is little or none that deal specifically with music education. However, there is an abundance of material relating to the exclusion of students from "non-curricular" activities. In these discussions, I hope to establish a consensus by which it can be said that the law of these other types of cases could or could not be applicable to music instruction. To do this, it must first be established that instrumental music is not a right but conversely is a privilege that the school system provides as an addition to the basic education of the students of the state.

In Anne Arundel County, the instrumental music program in the elementary schools is a pullout program. This requires the student to leave his regular classroom and go to another room or area to participate in the instrumental music program. They are "pulled out" of the regular classroom for one half an hour twice a week. They are graded and the grade does appear on the report card. These qualities of the program seem contradictory. On one hand the student is asked to choose to be involved in the program and is asked to leave his regular classroom to participate. However, on the other hand, he is given a grade for participation and accomplishment. This, I think, could lead to a bit of confusion if there ever was a court case involving instrumental music. Traditionally however, it has been understood by all concerned, administration, parents, students and teachers that participation in the program is not required and the student can be forced to stop participation if his academic grades drop or he stops participating or he can choose to stop participating.

There has been a great deal of effort on local and federal levels to improve the status of music education in the public school systems. In the *Goals 2000: Educate America Act*, the arts as a whole are considered a core subject and this has been written into federal law. When looking deeper into the Educate America Act, it became apparent that the framers of the act had no intention of including the arts a part of the act. It was not until arts organizations, particularly the Music Educators National Conference made a push and insisted that the arts be included in the act was there any recognition of the arts in the Act. It seems as if there is no real interest in promoting the arts as a valuable part of the education process.

There is also a case to be made concerning the possibility of elitism in the instrumental music program. In an article for the Council of Research in Music Education Bennett Reimer[1] makes a case for elitism, establishing the idea that the better students are usually the participants in the arts. They need to be recognized as elite since their work is held to such high scrutiny. Also, Edward J. Kvet published a study in the Journal of Research in Music Education in 1985 where he was able to show that the students involved in a pullout program did not suffer academically. This is generally contrary to the popular beliefs of educators, administrators and parents. Mr. Kvet was able to show no significant difference between music students and non-music students. Additionally, in a similar study conducted by Bobitaille and O'Neal (1981) it was shown that instrumental music students scored higher in all areas of academic accomplishment when compared

[1]Reimer, Bennett, "A Response to the Question of Elitism: Elitism, Open and Shut" Council for Research in Music Education., 93 (late summer 1987): 22-25

to non-music students. In 1997 I completed a small study that compared the scores of instrumental music students C.T.B.S. scores to those not involved in the program (ERIC TM029726). The results showed the music students scoring significantly higher in nine of ten categories. These types of studies been met with some skepticism and outright disdain due to the recent heightening of self esteem issues. Some proponents against elitism would argue that the arts make those who do not have a propensity for them to feel inferior. The war rages on.

PROPERTY RIGHT

Extra-curricular activities are usually conducted outside of the school day, are usually non-credit, supervised by school officials, non remedial and voluntary. There are two legal issues that need to be addressed. One, is the question of the status of extra-curricular activities as a protected property interest. The second issue concerns the student becoming a victim of a school's classification scheme, if one exists.

According to *Lamorte*[2] and in following ***Goss***, the courts have generally held that students do have a protected interest in the total educational process. However, there is some question as to the extent of this protection regarding part of the educational process. The courts have not agreed whether participation in one portion of the educational process is constitutionally protected. In many cases reviewed, there usually was another aspect of the law that became the overriding element in the decision of the court. For instance, in Palmer v. Merluzzi, the original issue was the denial of the student to participate in football due to a suspension. When looking deeper into the case, it becomes apparent that the participation was not the primary concern of the court. It was due process. The court ultimately held that the student had been provided due process by the officials of the school and his suspension was affirmed by the appellate court.[3]

This case shows that the extra-curricular activity was not a property right of the student. He was not denied an education except the ten day suspension, which was also considered justified since the student had been made known of the consequences of his actions in the student handbook. Secondly, the Interscholastic Athletic Program Policy Statement was also very clear in its requirements for participation in interscholastic sports.

The courts did recognize the football program as an integral part of the educational process, but as a loss of education due to the suspension, it was not as integral as a suspension from the academic school day for a comparable amount of time.

In several earlier cases it has generally been held that there is not a property right in the individual components of the educational process. In *Pegram v. Nelson*, 469 F. Supp. 1134 (N.C. 1979) the court stated:

> Since there is not a property interest in each separate component of the "educational process," denial of the opportunity to participate in merely one of several extracurricular activities would not give rise to a right to due process. However, *total exclusion* from participation in that part of the

[2]Lamorte, Michael W. 1999 *School Law: Cases and Concepts* MA Boston & Bacon pg 154-157

[3]Palmer v. Merluzzi, U.S. Court of Appeals, Third Circuit, 1989 868 F2nd. 90

> educational process designated as extracurricular activities for a *lengthy* period could, depending upon the particular circumstances, be a sufficient deprivation to implicate due process.(p 1140)

In one case that might have a more direct impact to instrumental music, *Brands v. Sheldon Community School*, 671 F. Supp. 627 (IOWA 1987) a band member was dismissed from the marching band for missing a competition performance without permission. The court held that the student did have protected right in the entire education process, but exclusion from a particular course was of no constitutional importance. This would show that the courts do not view extracurricular activities with the same importance as the academic subjects. However, this does not say whether the student was excluded from the entire instrumental music program or just the marching band. This raises another question concerning a definition of the entire education process. One must assume the courts' definition is to include all subject areas with each discipline being a separate component of the whole.

CASE LAW

<u>The ABC League v. Missouri State High School Activities Association, 530 F. Supp. 1033.</u>

Here, the plaintiff was excluded from participating in interscholastic sports because he had transferred from one school to another. The MSHSAA regulations state that a student who transfers other than due to promotion will be ineligible for 365 days. Since the intent of the student was to transfer for academic reasons (course offerings) it was believed that he could not be precluded from participating in sports. The court ruled that MSHSAA does have the option to adjudicate cases of this nature individually and could even set procedures to decentralize the process.

Additionally, the plaintiff, ABC, asserted that he had been injured and the interest that he is seeking to protect is within the "zone of interest sought to be protected or regulated by the statute." The injury is the suspension for 365 days and it seeks to protect similar persons (student athletes) by way of the Fourteenth Amendment.

The question in this arena is whether the Fourteenth Amendment has been violated by the transfer rule. A reference is made to Barnhorst, supra, 504F. Supp. at 457-458 where it is considered that the question of the transfer rule is a substantial federal question. The desire to participate in interscholastic sports is "substantial and significant." The court ruled that the transfer rule did not violate the Equal Protection Clause.

As it turns out, in Barnhorst II, the MSHSAA did not explain its position and asked the court to not decide the matter and simply let MSHSAA eliminate the exemption. This now means that there is no controversy, and no jurisdiction to decide the issue.

The plaintiff attempted to propose that the interscholastic program is a central component of the private education and is therefore protected by the fundamental rights of private education and freedom of association. However, ABC League was unable to persuade the court and it refused to find that a private education was a fundamental right, remaining consistent with the Supreme

Court. Moreover, the fundamental right of association is not undermined by the rules of the MSHSAA since membership is voluntary and some rules are necessary to insure uniformity.

To put this in a context of music instruction it seems that the exclusion may be permissible. This would probably force the music department to develop a set of minimum standards for entrance into the program similar to the bylaws of the MSHSAA Common sense tells us that exclusion from the band would not cause the student to suffer a lack of association since there are many opportunities for the child to interact with peers throughout the day. Unfortunately, I can foresee the widespread lack of use of the standards to boost enrollment but while enforcing it to exclude certain student not deemed to be desirable. This would open a new set of legal issues regarding discrimination.

McPherson v. Michigan High School Athletic Association Inc. 119 F. 3rd 453.

The bylaws of the Michigan High School Athletic Association (MHSAA) states that "[a] student shall not compete in any branch of athletics who has been enrolled in grades nine to twelve, inclusive, for more than eight semesters."

Mcpherson's academic performance had prevented him from completing high school in eight semesters. This is because he suffers from a condition known as Attention Deficit Hyperactivity Disorder ("ADHD") and a seizure disorder. Both conditions were undiagnosed at the time he was attending school. As a result, he repeated the 11th grade which accounted for his seventh and eighth semesters.

During his senior year he chose to compete on the high school basketball team, but was prevented due to the rules of eligibility established by the MHSAA. The district court granted an injunction in favor of Mcpherson and allowed him to play on the team and they also prevented MHSAA from penalizing the school district where he played.

The MHSAA upon appeal was able to have the injunction vacated since at this time the case was moot because McPherson is no longer attending the school.

NOTES

Although it never considers the students' disabilities, it does address the schools' limits of liability due to the student completing school. It seems that the school would no longer be liable after the student has graduated and left the school system.

Although this case was finally found moot due to the graduation of the student, it does speak to the issue of a special education student involved in an extracurricular activity stating that the preliminary court found in favor of McPherson on the basis of the ADA and the Rehabilitation Act. The court felt that McPherson was likely to succeed on the merits of the ADA and the Rehabilitation Act claims. Although not explained, this by itself could have a great impact if extended to music education. This could be interpreted to force the school system to allow special education student to be included in the instrumental music program despite their ability or physical

readiness. Fortunately the court found that the age requirements of the MHSAA did not violate the ADA or the Rehabilitation Act. This still leaves open the question of whether a special education student could be excluded from participation solely because he does not meet minimal requirements to be successful in the instrumental music program.

However, this case was about a senior high student. If the same were to hold true for an elementary student, the time that a school could be held liable could be quite significant. If this is substantial, then the school would have to appraise its situation and react accordingly. In the end, I do not believe that this case would be much assistance in the conditions described for this topic.

Joseph Dennin v. The Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663

Joseph Dennin is the guardian of David Dennin, a nineteen year old student with Downs Syndrome. As a result, he spent four years in middle school as opposed to three. In the end, during his senior year in high school the CIAC determined he was not eligible to compete as a member of the swim team since he turned nineteen before September 1, 1995, his senior year. The CIAC stated that he could participate as an exhibition swimmer but would be prohibited from scoring points for the team. Dennin requested a waiver and it was denied by the CIAC.

In the discussion, there are two arguments presented: one of irreparable harm and the second concerning probable success. In regards to irreparable harm, it is clear that the plaintiff will have damage to his self-esteem and social skills if not allowed to continue competing, since he will be denied full membership benefits. This is seen as contrary to his IEP goals. Also, teammates who participate with the plaintiff will not be able to earn points for the team which may have been scored despite Dennin's slowness, since it was shown that Dennin had the ability to earn points. In a close contest the coach may be forced to make a decision that could negatively impact Dennin.

Regarding probable success, it was determined that Dennin does have a disability as defined by the ADA (see Johnson v. Florida High School Activities Ass'n, Inc., 899 F. Supp. 579, 582 and he is being excluded from participation solely because of his disability. Additionally, the CIAC does receive federal financial assistance albeit indirectly from schools who receive federal funds and are therefore subject to the Rehabilitation Act, (see Pottgen v. Missouri High School Activities Ass'n, 857 F. Supp. 654, 663) and it holds meets in facilities that receive funds. Dennin is also considered to be an "otherwise qualified" individual since with reasonable accommodations he can meet the "necessary" or "essential" requirements of the program.

This test might go very far in determining the eligibility of a student to participate in a music class. If it can be determined before enrollment that the student can meet the minimum requirements than there can be no reason to exclude. The difference as in Dennin, the plaintiff had already demonstrated success in the program and he had met the necessary or essential requirements as demonstrated by past successes.

The new music student would not have the past successes to rely on. It would have to be determined if reasonable accommodations could be made to include the student. According to Pottgen, 40 F.3d at 929 (citing School Bd. of Nassau County, Fla. v. Arline, 480

U.S. 273, 287 n.17, 94 L. Ed. 2d 307, 107 S. Ct. 1123 (1987); Johnson, 899 F. Supp. at 584, it must also be determined if the reasonable accommodations would impose an undue financial or administrative burden or would fundamentally alter the nature of the program. In Potgen it was determined that if the age waiver is granted there would be a competitive advantage and the other students would be at risk due to the age difference of the plaintiff, therefore the waiver would cause a fundamental alteration of the game. In a music case the age problem would not exist. Music does not recognize bounds of age. The only factor to consider is the one of probable success. However, in several other cases it is determined that it would be necessary to have a case-by-case analysis to decide eligibility. This may cause an undue burden on the system since the music teacher would not be qualified to make such a judgement. This would then require other individuals or committees charged with oversight of the student's progress. Since these persons probably do not have expertise in music, it seems unjust for them to make decisions concerning participation in music programs. We are now with a dilemma of who determines the best course of action for the well being of the student. I do not know that this issue has been addressed.

Finally, in Dennin the motion for injunction was granted stating that there was no justification for the defendant to deny the age waiver.

Dru Rhodes v. Ohio High School Athletic Association, 939 F. Supp. 584; 1996 is similar to Dennin in that the student was precluded from participating in football due to the limit of eight semesters of attendance. The increase in high school attendance was due to a diagnosis of learning disabilities including Attention Deficit Disorder. This caused poor performance in school which resulted in him having to transfer and be held back.

The court basically makes the same arguments for Rhodes as was made in Dennison. It was necessary to deal with the federal issues involved in ADA and the IDEA. " Here, as in Sandison, the Defendant Athletic Association argues that the regulation in question is an "essential" requirement of its program. In that cause, the Sixth Circuit upheld the district court finding that the nineteen-year-old rule was "necessary" and "essential" because the rule advanced two purposes: first, it "safeguards against injury to other players"; and second, it "prevents any unfair competitive advantage that older and larger participants might provide."

What is different about Rhodes is that it was determined that the Plaintiff could not demonstrate a likelihood of success, that there is a likelihood of harm to others, and the public interest disfavors an injunction. The injunction was denied. This allows OHSAA to enforce its rules.

NOTES

On interesting fact concerning both cases is the involvement of the athletic organization. An outside organization that imposes it rules and regulations upon the school system. This aspect is not felt in the world of instrumental music. Whether these cases will have any backbone in a music case would be suspect.

Allowing Denin to participate but not compete was demeaning to the student, especially since he had in previous years been allowed to compete. This however, seems to show that the reason for

his non participation status was not the disability, since the disability was ongoing, but rather the rules of the CIAC. As the court stated, a reasonable accommodation is required to accommodate the disabled. Dennin's disability has caused him to stay in school past the eighth semester. A reasonable accommodation would be a waiver of the age requirements. The music education process does not make these discriminations. As long as a student is in school he would usually be eligible for participation in the instrumental music program. There might be a question as to participation in such special events as all-county band, all-state band or choir, etc. These, I have not investigated. However, it must also be noted that usually, the students involved in the instrumental music program are students who are accelling in their academic endeavors as well.

Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F.3d 1026 [4 AD Cases 1478] (6th Cir. 1995)

BACKGROUND

On August 25, 1994, after receiving evidence and hearing oral argument, I granted plaintiffs' request for a temporary restraining order permitting them to participate in cross-country races at their respective high schools. I found that plaintiffs were entitled to immediate relief because plaintiff Ronald Sandison was scheduled to participate in a cross-country race on the hearing date and plaintiff Craig Stanley was scheduled to participate in a race within ten days after the hearing date. This Opinion and Order is in response to Plaintiffs' Motion for Preliminary Injunction.[4] This case arises out of plaintiffs' claim that defendant, the Michigan High School Athletic Association ("MHSAA"),[5] has violated the Americans With Disabilities Act, 42 U.S.C.A @@ 12101-12213 [**2] ("ADA"), Section 504 of the Rehabilitation Act of 1973, 29 U.S.C.A. @ 794 ("Section 504" or "Rehabilitation Act"), 42 U.S.C.A. @ 1983 and the Michigan Handicappers' Civil Rights Act, M.C.L.A. @@ 37.1101-1607 ("MHCRA"), by its refusal to allow plaintiffs to participate in interscholastic athletics in the 1994-1995 school year. Under MHSAA Regulation I @ 2, plaintiffs are ineligible to participate in any athletic sport at their respective high schools because they are nineteen years old.

As set forth in the findings of facts and conclusions of law, pursuant to Fed. R. Civ. P. 52(a), I conclude that: (1) plaintiffs have shown a probability of success on the merits; (2) plaintiffs will suffer irreparable harm if they are not permitted to participate on the cross-country and track teams at their respective [*485] high schools; (3) the harm to plaintiffs, if the preliminary injunction is not granted, would outweigh any injury that defendant would suffer by the imposition of the injunction; and (4) the public interest would be best served by the issuance of the preliminary injunction. Plaintiffs' Motion for Preliminary Injunction is GRANTED.

II. FINDINGS OF FACT

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[4]Evidence was received and oral argument heard on plaintiffs' motion on September 6, 1994.

[5]Plaintiffs also name Rochester Community Schools and the Grosse Pointe Public School System. Plaintiffs acknowledge that the school districts are not adverse to plaintiffs' request for relief but have named them in order to permit this court to protect the districts from the imposition of penalties by the MHSAA. (Pls.' Compl. at 4.) Thus this opinion focuses on the conduct of the MHSAA.

Plaintiffs, Ronald G. Sandison ("Sandison") and Craig M. Stanley ("Stanley") are both nineteen years old. Sandison is a senior at Adams High School ("Adams"), part of the Rochester Community School District, and participated on the cross-country and track teams during his freshman, sophomore, and junior years at Adams. Stanley is a senior at Grosse Pointe North High School ("GPN"), part of the Grosse Pointe Public School System, and he also participated on the cross-country and track teams during his freshman, sophomore, [**4] and junior years at GPN. Both students wish to continue their participation on the cross-country and track teams at their respective schools during their senior years but are prohibited from competing under MHSAA Regulation I @ 2 that provides in SECTION 2-AGE:

A student who competes in any interscholastic athletic contests must be under nineteen (19) years of age, except that a student whose nineteenth (19th) birthday occurs on or after September 1 of a current school year is eligible for the balance of that school year. Any student born before September 1, 1975, is ineligible for interscholastic athletics in Michigan. (MHSAA Handbook 1994-95 at 29.) Because both plaintiffs were nineteen years old before September 1 of the current school year, and because both plaintiffs were born prior to September 1, 1975,[6] they are ineligible to participate on the cross-country and track teams at their respective schools. Although MHSAA has procedures in place for the waiver of most eligibility requirements, there are no such procedures for the age requirement. (MHSAA Handbook 1994-95 at 20.)

Though there is some evidence that both plaintiffs receive some form of special education support in high school, the learning disability which triggers their case was discovered when they were both held back in grade promotion during grade school. Sandison was previously diagnosed as suffering from an auditory import disability which caused him to have difficulty speaking, reading, and writing. (Test. of Janet Sandison, Sept. 6, 1994.) His disability became apparent when he was three and this caused him to spend a significant number of years in an ungraded classroom.[7] At the age of seven, Sandison was still in kindergarten.[8] After completion of kindergarten, Sandison was placed in graded classrooms in which he continued to receive special education support. Because his early education was delayed due to his learning disability, Sandison is two years behind his age group.

Stanley was previously diagnosed as having a learning disability in mathematics. His disability was diagnosed while he was at the kindergarten level. (Test. of Michael Sandison, Sept. 6, 1994.) Similar to Sandison, Stanley repeated kindergarten and subsequently spent a number of years in an ungraded classroom. By the time Stanley entered a graded classroom, he was also two years behind his age group.

Defendants, Rochester Community Schools and the Grosse Pointe Public School System, are

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[6]Sandison was born on May 10, 1975; Stanley was born on May 29, 1975. (Pls.' Compl. at 2.)

[7]At age four and one half years, he was placed in pre-primary for the impaired, a classroom for children who show a significant learning impairment. He stayed in pre-primary until he was six, at which time he entered an ungraded kindergarten with special education support. (Test. of Janet Sandison, Sept. 6, 1994.)

[8]At age four and one half years, he was placed in pre-primary for the impaired, a classroom for children who show a significant learning impairment. He stayed in pre-primary until he was six, at which time he entered an ungraded kindergarten with special education support. (Test. of Janet Sandison, Sept. 6, 1994.)

public school districts within the state school system. Both school districts receive federal financial assistance[9] and both districts are members of the MHSAA.

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M.C.L.A. @ 380.1521 (West 1988). Virtually every public school and private secondary school in the State of Michigan is a member of MHSAA.[10]

III. SUBJECT MATTER JURISDICTION

Plaintiffs argue that MHSAA is a private entity that provides or operates a public accommodation under Title III of the ADA, or, alternatively, is a public entity under Title II of the ADA. MHSAA argues that this court does not have jurisdiction because it is neither a private entity operating or providing a public accommodation nor a public entity and plaintiffs therefore have no right of action under the ADA. As a basis for their claim under section 504, plaintiffs argue that MHSAA receives federal financial assistance. MHSAA counters that it does not receive any federal assistance and is therefore not subject to the jurisdiction of this court under section 504.

I conclude as I did in granting the temporary restraining order,[11] that there is a basis for jurisdiction under the ADA and section 504; MHSAA is a private entity operating a public accommodation and a public entity; and MHSAA is an indirect recipient of federal financial assistance. Thus, this court has subject matter jurisdiction under 28 U.S.C.A. @ 1331.

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Although MHSAA is not a direct recipient of federal funding, it is subject to the Rehabilitation Act because it receives federal funds indirectly. See Jacobson v. Delta Airlines, Inc., 742 F.2d 1202, 1212 (9th Cir. 1984) (defendant not beyond the scope of the Rehabilitation Act simply because the assistance allegedly received was indirect). The schools and corresponding buildings or facilities in which defendant carries out all of its functions (interscholastic athletic competitions and tournaments) receive federal assistance. The coaches of the teams that participate in the competitions sponsored by defendant are school district employees. Because it is not disputed that each of the districts involved here receives federal financial assistance, defendant is subject to the Rehabilitation Act as an indirect recipient of federal assistance.

IV. CONCLUSIONS OF LAW

In determining whether a preliminary injunction should be issued, the court must consider: (1) whether the movant has shown a strong or substantial likelihood or probability of success on the merits; (2) whether irreparable harm will result without an injunction; (3) whether issuance of a

[9]Such funding includes grants pursuant to the Individuals with Disabilities Act, 20 U.S.C.A. @@ 1400-1485.

[10]There were 704 member senior high schools in the MHSAA during 1993-94. There were more than 249,000 participants on the athletic teams in Michigan high schools. (MHSAA Handbook 1994-95 at 13.)

[11]Temporary Restraining Order, August 25, 1994.

preliminary injunction will result in substantial harm to third parties; and (4) whether the public interest is advanced by the injunction. International Resources, Inc. v. New York Life Ins. Co., 950 F.2d 294, 302 (6th Cir. 1991); Frisch's Restaurant, Inc. v. Shoney's Inc., 759 F.2d 1261, 1263 (6th Cir. 1985); Thomas by and through Thomas v. Davidson Academy, 846 F. Supp. 611, 616 (M.D. Tenn. 1994). [**13] These four considerations are factors which must be carefully balanced, not prerequisites which must be met. In re DeLorean Motor Co., 755 F.2d 1223, 1229 (6th Cir. 1985).

A. Probability of Success on the Merits of Plaintiffs' ADA and Section 504 Claims.[12]

Under the ADA, it is unlawful for a place of public accommodation [or public entity][13] to discriminate against an individual on the basis of disability "in the full and equal enjoyment of the facilities, privileges, advantages or accommodations of [such] place of public accommodation [or public entity] by any person who owns, leases (or leases to), or operates such place of public accommodation [or public entity]." 42 U.S.C.A. @@ 12182(a) and 12132.

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In order to establish a claim under the ADA, plaintiffs must demonstrate a similar set of elements to those they are required to prove under the Rehabilitation Act. Thomas, 846 F. Supp. at 617. See also E.E.O.C. v. AIC Sec. Investigation Ltd., 820 F. Supp. 1060, 1064 (N.D. Ill. 1993) (applying case law developed under the Rehabilitation Act and corresponding standards to claims arising under the ADA). Plaintiffs must prove: (1) they have a disability; (2) defendant MHSAA is subject to the ADA; and (3) that they were denied the opportunity to participate in or benefit from services or accommodations on the basis of their disabilities; or that defendant has failed to make reasonable accommodation by modifying policies, practices, or procedures, when such modifications are necessary to afford such goods, services and accommodations to individuals with disabilities and defendant has not demonstrated that such modifications would fundamentally alter the nature of such goods, services or accommodations. 42 U.S.C.A. @ 12182.

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[12]Plaintiffs have asserted four causes of action: violation of Titles II and III of the ADA, violation of Section 504 of the Rehabilitation Act, violation of the MHCRA and violation of 42 U.S.C. @ 1983. For the purpose of ruling on Plaintiffs' Motion for Preliminary Injunction, I have limited this opinion to the claims for violations of the ADA and Section 504 only. The MHCRA mirrors the federal statute and any conclusions reached in applying the ADA apply equally to the MHCRA claim. Although I have not analyzed plaintiffs' @ 1983 claim in this opinion, there is case law support for plaintiffs' claim that @ 1983 is also a basis for issuance of a preliminary injunction in this case. See Crocker v. Tennessee Secondary School Athletic Association, 735 F. Supp. 753 (M.D. Tenn. 1990) (handicapped student at high school entitled to preliminary injunction on the basis of alleged violation of 42 U.S.C.A. @ 1983); Berschback v. Grosse Pointe Public Sch. Dist., 154 Mich. App. 102, 111, 397 N.W.2d 234 (1986) (the adoption and application of athletic eligibility rules by the MHSAA constitute state action for purposes of application of the constitutional right
to equal protection of the laws).

[13]42 U.S.C.A. @ 12132 applies to public entities while @ 12182 applies to public accommodations. The prohibitions of both titles are the same and both are applied to the facts of this case in ruling on Plaintiffs' Motion for Preliminary Injunction.

To establish a claim under the Rehabilitation Act, plaintiffs must [**16] prove that (1) they have disabilities which are recognized under the Act; (2) they are otherwise qualified for participation on the cross-country and track teams at their respective high schools; (3) plaintiffs are being excluded from participation in, being denied the benefits of, or being subjected to discrimination, in the interscholastic athletic program run by MHSAA, solely by reason of their disabilities; and (4) the interscholastic athletic program operated by MHSAA receives federal financial assistance. Doherty v. Southern College of Optometry, 862 F.2d 570, 573 (6th Cir. 1988); Hoot by Hoot v. Milan Area Schs., 853 F. Supp. 243, 249 (E.D. Mich. 1994); Pottgen v. Missouri State High School Activities Association, 3 A.D. Cas. (BNA) 364; 1994 WL 371355 at *12 (E.D. Mo. April 29, 1994).

1. Plaintiffs' learning disabilities are disabilities within the meaning of the ADA and the Rehabilitation Act.

In the ADA and the Rehabilitation Act, disability is defined as "a physical or mental impairment that substantially limits one or more of the major life activities of [an] individual; a record of an such impairment; or being regarded as having such an impairment." 42 U.S.C.A. @ 12102 (West 1994); 29 U.S.C.A. @ 706 (8). Major life activities include a variety of functions including learning. 28 C.F.R. @ 35.104; Thomas, 846 F. Supp. at 617.

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Defendant does not dispute that plaintiffs previously suffered from disabilities which caused them to be delayed by two years in their early education. However, defendant argues that participation in interscholastic sports is not a major life activity as contemplated under the Acts.

Defendant downgrades the importance of interscholastic sports in plaintiffs' learning programs. Sandison has better grades[14] as a result of his involvement on the cross-country and track teams and attributes his improved performance to his interaction with his cross-country and track teammates who encourage him to study and to be disciplined. (Test. of Ronald Sandison, Sept. 6, 1994.) Stanley has improved social relationships as a result of his participation on the cross-country and track teams. (Test. of Craig Stanley, Sept. 6, 1994.) Because participation on the cross-country and track team is an important and integral part of the education of plaintiffs, it is as to them a major life activity. Thus, plaintiffs' disabilities limit a major life activity as contemplated by ADA and the Rehabilitation Act.

2. Plaintiffs are "otherwise qualified" to participate on the cross-country and track teams.

An individual is "otherwise qualified" within the meaning of the Rehabilitation Act if he is able to meet all of a program's necessary requirements in spite of the disability, with reasonable accommodation. Doherty, 862 F.2d at 575 (affirming trial court's modification of "otherwise qualified" standard established in Southeastern Community College v. Davis, 442 U.S. 397, 406, 60 L. Ed. 2d 980, 99 S. Ct. 2361 (1979)).

[14]Sandison has gone from a 2.2 grade point average to a 3.2 during his involvement on the cross-country and track teams. (Test. of Janet Sandison, Sept. 6, 1994.)

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3. MRSAA is subject to the requirements of the ADA and the Rehabilitation Act.

As discussed previously in III., supra, MHSAA is subject to the requirements of the ADA and the Rehabilitation Act because it is a private entity operating a public accommodation, a public entity, and an indirect recipient of federal financial assistance.

4. Plaintiffs are being denied participation on the cross-country and track teams solely by reason of their disabilities and defendant has failed to make reasonable accommodation.

Plaintiffs argue they are being denied the right to compete in interscholastic athletics solely on the basis of their disabilities in violation of the ADA and the Rehabilitation Act. Because their respective learning disabilities required that they be placed in ungraded classrooms for a number of years during their early education, they are both nineteen years of age and ineligible from participation in interscholastic sports under MHSAA regulations. MHSAA argues that plaintiffs are not being denied participation on the basis of their disabilities but rather on the basis of a neutral, uniformly-applied, age standard. Defendant argues plaintiffs are not, therefore, "otherwise qualified," as discussed in 2. supra, because they fail to meet an essential eligibility requirement. Similar to the Rehabilitation Act[15] the ADA[16] requires reasonable accommodation be made to enable plaintiffs to meet MHSAA eligibility requirements.

In response to the reasonable accommodation requirement under the ADA and the Rehabilitation Act, defendant argues that no reasonable accommodation can be made because the age requirement serves as an important and essential safeguard in competitive interscholastic sports. According to defendant, the age eligibility requirement safeguards against injury, in the case of over-age and correspondingly over-sized participants, and it prevents any unfair competitive advantage that older and larger participants might provide....

It is beyond dispute that the rule promulgated by the MHSAA is necessary. A line must be drawn. Basing that line on age is sound. The conflict between the rule and the ADA and its sister statute, the Rehabilitation Act, points up the need, as is evident in this case, for a resolution of competing interests. The statutes, which have as their purpose the redress of the needs of disabled or handicapped persons, need not destroy the rule which limits on the basis of age, eligibility to participate in high school athletics but the proper outcome must be determined on a case-by-case basis.

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[15]See 2., supra.

[16]Under the ADA, discrimination includes: (i) the imposition or application of eligibility criteria that screen out or tend to screen out an individual with a disability from fully and equally enjoying any facilities, privileges, or advantages, or accommodations, unless such criteria can be shown to be necessary for the provision of the . . . facilities, privileges, or advantages, or accommodations being offered; (ii) a failure to make reasonable modifications in policies, practices, or procedures, when such modifications are necessary to afford such facilities, privileges, or advantages, or accommodations to individuals with disabilities, unless the entity can demonstrate that making such modifications would fundamentally alter the nature of such . . . facilities, privileges, or advantages, or accommodation being offered or would result in undue burden 42 U.S.C.A. @ 12182(b)(2)(A).

Applying defendant's concerns to the facts of this case, reasonable accommodation of plaintiffs' disabilities should be made by waiving the age eligibility requirement. Plaintiffs are overage because they were held back in grade promotion in their early education as a result of their disabilities. Thus, plaintiffs are ineligible to compete because of a previous disability. However, plaintiffs are attempting to participate in two non-contact sports, cross-country and track. Therefore, the safety concern is not an issue in this case. Additionally, plaintiffs have been described as mid-level competitors by their respective coaches. (Test. of Coaches William Cicciarelli and Patrick Wilson, Sept. 6, 1994.) Thus, although they are not at the bottom of the team roster, they are not the "star" players so as to provide any unfair competitive advantage to their respective teams. With the reasonable accommodation of the age requirement in this case, plaintiffs are otherwise qualified under section 504 of the Rehabilitation Act.

Defendant's argument that it will suffer an undue burden through increased eligibility challenges takes my conclusion too far. The conclusion I reach today is not universal. It is to be applied on a case-by-case basis. The facts of each case will dictate the proper result under the ADA and the Rehabilitation Act. There may be an instance where a disabled individual should be denied participation on the basis of the concerns expressed by defendant, safety and unfair competitive advantage. In that case, when and if it should arise, defendant should respond accordingly after carefully analyzing the situation and balancing the goals of the ADA and the Rehabilitation Act, the rights of handicapped individual and the best interests of the interscholastic sports program.

For the reasons discussed above, I conclude that plaintiffs have shown a probability of success on the merits of their ADA and Rehabilitation Act claims.

B. Irreparable harm will result if the injunction is not granted. Plaintiffs will suffer irreparable harm if an injunction is not issued. As a direct result of their participation in interscholastic sports, plaintiffs have shown academic and social improvement despite their disabilities. This is their senior year and such performance is more important now than ever. As discussed above, such participation has become an integral part of plaintiffs' learning and overall performance. If it is not continued, their academic performance may decline. Clearly, plaintiffs will suffer irreparable harm if an injunction is not issued.

C. Issuance of the injunction will not result in substantial harm to others.

D. The Public Interest Is Advanced by the Issuance of the Injunction.

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The purpose of the ADA and the Rehabilitation Act is to include persons with disabilities in society equal to those without disabilities by addressing discrimination against persons with disabilities. 42 U.S.C.A. @ 12101 (West 1994). There is significant public interest in eliminating discrimination against individuals with disabilities and such public interest is advanced by issuing an injunction against MHSAA. The injunction would permit plaintiffs to enjoy, to the fullest extent, their high

school education experience as do other non-disabled students.

Having balanced these factors, I find that they weigh in favor of granting a preliminary injunction. Plaintiffs have shown a probability of success on the merits; that they will suffer irreparable harm if they are not permitted to participate on the cross-country and track teams at their respective high schools; that the harm to plaintiffs, if the injunction is not granted, would outweigh any injury that defendants would suffer by the imposition of the injunction; and that the public interest is best served by the issuance of the preliminary injunction.

IV. CONCLUSION

Plaintiffs' Motion for Preliminary Injunction is Granted. An appropriate Order has been issued on this date.

NOTES

In this case several new guidelines are being made. Essentially the courts are saying that the allowing of the special student to continue to participate must be based on several factors. Most importantly, the items addressed are: (1) Probability of Success on the Merits of Plaintiffs' ADA and Section 504 Claims, (2) Irreparable harm to the Plaintiffs' will result if the injunction is not granted., (3) Issuance of the injunction will not result in substantial harm to others.

These factors could have a great deal of bearing regarding the instrumental music program. In #1 there must be a determination as to the possibility of success of the future musician. In the public school system as it now stands, there is no way to determine the possibility of success. As stated in the background section of this paper, it is not possible for the instrumental music teacher to screen the students by the use of any musical testing in order to determine their present level of musical accomplishment. Therefore it is essentially impossible to determine the probability of success of a potential beginner in the instrumental music program. Number 2., can be substantiated simply because instrumental music activity generally is not a dangerous activity for the participants. Occasionally, overexposure to the musical sounds can result in hearing damage, but this generally takes a long period of time. It is more of a threat to the teacher than the student. Number 3, if limited to the possibility of harm to others can be proven, may have an effect on the students participation. If, for example, the student cannot be successful but is allowed to participate, he may affect the performance of the other students by discouraging participation. This can be caused because one important aspect of participation in the ability of the students to act as a group for the common good of the group, namely a performance of some type. If the special student is allowed to perform but is not successful, he may detrimental effects on the esteem of the group since the performance of the group will not be as good as it could have been without the participation of the special student. The audience would not hear or see the lack of success of the special student, which could affect their opinion of the final product. I have seen this happen. At the end of a concert that was less than outstanding, students have been known to say such things as: "if only "so and so" was not here we would have sounded better," or, "I wish "so and so" wasn't here we are going to sound awful."

CONCLUSIONS

In music education, and with the question I am immediately presented with, there is no history of participation. If the student had been successful in the past, it would be obvious that the student would be allowed to continue. There are many other factors involved in the circumstances I have on going. The student's older sister is very talented. She sings in the church choir. My understanding is that she frequently is a featured soloist. She also participates in recordings that attests to her accomplishments. However, the sister is not disabled. It has been said by various staff members that my student sees his sister as a role model and wants to be like her, hence the desire to participate musically. In addition, the mother is not being realistic. It has been said to me that she is very persistent to the point of extreme. She considers her son normal and refuses to acknowledge the disabilities. Also, the grandmother is greatly involved in the school, even to the point of being a substitute teacher. However, she has been known to get in the way of the educational process of the student. She has delayed me in the hall wanting to talk about her grandson when I have classes waiting. Unfortunately, other than one visit from the mother and running into the grandmother in the hall one time, I have had no contact with the family. They do not seem to be interested. I have sent several notes and progress reports home explaining that the student is not progressing, but have had no response.

I think the lack of appropriate case law that can be related convincingly to the instrumental music education can be used to an advantage. The vague relationships to athletics and age limitations can carry weight with the parents but would probably not be very successful if actually challenged in the courts. There is probably a lack of cases simply because the matter of participation in instrumental music is not viewed as an important part of the child's education. There most likely exists a sequence of events that has been repeated thousands of times in instrumental music education. After beginning the program of study, some students find the rigors of instrumental music too much. They commit to the class, then after a short period of time realize they are not going to be successful and they choose to drop out. This is most apparent when you consider the disabled student. Many times I have been challenged to teach a disabled student. After putting much effort and extra time for unofficial accommodations and modifications I am usually "let off the hook" because the student decides to discontinue after a period of time. This sequence of events avoids the need for any legal intervention, hence no immediately relevant background to draw from. The most recent dilemma at hand personally, is an exception to the normal and expected course of events as described.

In a discussion with the county's staff attorney several factors came to light. Specifically, it is not possible to exclude a student solely due to a disability. The county does not have a process of determining the eligibility of students to participate in the instrumental music program (a test for minimal competency). Lacking this process, every student is eligible. In order to enlist this type of testing, it would have to be system wide and administered to every student.

A recent case was related where a student who was being home and hospital taught wanted to participate in a sport. Originally, the county held that he was ineligible since he was not attending the school. However, the county was ordered to allow the student to participate or at least attempt to participate. The sole reason for excluding him was his disability. Had he not been disabled, he would have been attending the school and he is still a part of the system, therefore he was eligible

for the team. The county was required to offer an equal opportunity for the student to participate. The county lost its argument.

Another factor that has not been considered in any of the cases presented here is the necessity of an Individual Education Program. Since most of the athletic endeavors are truly extra curricular, I would suspect there is no need for the I.E.P.unless the extracurricular program is written into the I.E.P. as a beneficial point of the student's education. Since the instrumental music program is a pullout program and is part of the school day, I would suspect that an I.E.P. for the music component of education becomes very important. According to counsel, if the instrumental music program is not part of the I.E.P., then the objectives of the I.E.P. are not being met. There is a need for the instrumental music program to be included if only to justify the students failure. I as the "expert" in the field should be included in the review meetings since I am a teacher of the student. This would allow for the I.E.P team to deal with the lack of success and make a determination that instrumental music is not working for him. Of course, the parents do have the ability to appeal, but hopefully it would become apparent that the student is better served in another endeavor

Thirdly, when questioned, counsel would not agree that there is a lack of case law in this area. He stated that he was unaware of any cases that dealt directly with music. However, it appeared that he was concerned with the larger picture. The ability of the school system to meet the needs of the special education student seemed to be paramount. Additionally, the need to follow all applicable laws to protect the system was also extremely important. So important, which after I related my present experience, he insisted that I ask my principal to call him as soon as possible.

The county's counsel insisted that the guidelines for the I.E.P. be followed. If not there is a possibility that we are setting ourselves up for a disability claim because there is no other reason to bar him except for the disability. Additionally, if there are no accommodations made then the school would be violating 504. Unfortunately, I have never seen this addressed in the school I am employed. This includes the general music program too. I have never heard of the general music teacher being involved in an I.E.P. meeting or an A.R.D. More often than not, the opposite has been the rule of the day. The overriding attitude of the special educators is one of avoidance. The school counselors do not want to get involved, the Occupational Therapist generally is uneducated in music and therefore is reluctant to get involved. The Physical Therapist is in the same position as the O.T. The classroom special education teacher and the classroom aids are also not proficient regarding instrumental music education. If the special education professionals were to consider instrumental music as a viable subject and devote some time to understanding and training we might realize a viable alternative to the education process.

Additionally, I think the music department has some homework to do. They apparently are quite ignorant of the workings of the special education statutes and policies. They have also adopted an attitude of avoidance. Hoping that the student will simply become discouraged and drop out is not the best way to serve the students. However, this is the answer I received when I initially discovered that my particular student had such severe disabilities. A new realization by the music department could result in a heightened awareness of the importance of instrumental music in the schools. By acting as a voice for the disabled, the music department could in the long run boost its

own esteem in the world of education.

I have seen many disabled students become very successful in instrumental music. In one case a colleague had several autistic boys in the same class. He taught them to be successful in percussion. With much training and discipline he was actually able to have them perform with the band in public concerts. Of course it seemed unusual to have several junior high students standing at attention with their backs against the rear stage with their drumsticks at the ready when they were not playing, but they were successful.

CITATIONS

The ABC League v. Missouri State High School Activities Association, 530 F. Supp. 1033.

Mcpherson v. Michigan High School Athletic Association Inc. 119 F. 3rd 453.

Joseph Dennin v. The Connecticut Interscholastic Athletic Conference, Inc., 913 F. Supp. 663

Dru Rhodes v. Ohio High School Athletic Association, 939 F. Supp. 584; 1996

Sandison v. Michigan High School Athletic Ass'n, Inc., 64 F.3d 1026 [4 AD Cases 1478] (6th Cir. 1995)

Pegram v. Nelson, 469 F. Supp. 1134 (N.C. 1979)

Brands v. Sheldon Community School, 671 F. Supp. 627 (IOWA 1987)